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IN THE
Supreme Court of the United States

F. HOFFMAN-LA ROCHE, LTD., *et al.*,
PETITIONERS,

v.

EMPAGRAN, S.A., *et al.*,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE GOVERNMENT OF CANADA AS *AMICUS CURIAE* SUPPORTING REVERSAL

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THE INTEREST OF THE *AMICUS CURIAE*

The Government of Canada wishes to express its appreciation to this Court for the opportunity to submit its views as *amicus curiae* on the important issue of the extraterritorial application of the laws of the United States.[1]

The Government of Canada and Canadian citizens have a particular interest in how principles of comity and international law that are recognized in both the United States and Canada are brought to bear on the resolution of this case. Canada has an equally strong interest in the practical consequences of this Court's decision both because of the interdependence of the economies of Canada and the United States, which enjoy the largest bilateral trading relationship in the world, and because of the significant effects the extraterritorial application of U.S. antitrust law is likely to have on the administration of Canada's own competition laws and policies.

In 1889, Canada became the first industrialized nation to enact antitrust legislation. Canada's antitrust laws currently are codified in a single comprehensive statute, the Competition Act, R.S.C. 1985, ch. C-34, as amended (the "Competition Act").[2] These laws are similar in many respects to those of the United States as they relate to price-fixing cartels. In most circumstances, naked price-fixing cartels are subject to the same criminal denunciation in

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[1] Pursuant to Supreme Court Rule 37.6, counsel for a party neither authored this brief nor any part of it, and no person or entity other than *amicus curiae* or its counsel made any monetary contribution to its preparation or submission. The parties' consents to this submission have been filed concurrently with this brief pursuant to Supreme Court Rule 37.3(a).

[2] *Available at* http://laws.justice.gc.ce/en/C-34/.

Canada as in the United States. Canada reserves the harshest punishment for international and domestic horizontal cartel behavior with maximum fines of up to Cdn $10 million and imprisonment of up to 5 years. Like the United States, Canada provides for a civil cause of action for victims of cartel behavior.

Differences between Canada's antitrust laws and those of the United States reflect economic policy decisions of Canada's lawmakers and Canada's unique socio-economic conditions. For example, Canada's prohibitions of cartel behavior are predicated upon the economic effect of the behavior (a combination of market power and a likelihood of injury to competition). Further, in contrast to the United States, Canada has determined that punitive sanctions for illegal cartel behavior be imposed only through prosecutions initiated by the Government. Civil plaintiffs are limited to the recovery of their actual damages and associated costs. The structure of these antitrust remedies reflects Canada's sovereign choices regarding the appropriate measures to combat anticompetitive behavior within its territory.

SUMMARY OF THE ARGUMENT

The Government of Canada submits that recognized legal principles militate against the broad extraterritorial application of the Sherman Act under the circumstances of this case. United States legal principles limit the exercise of extraterritorial jurisdiction over non-nationals when such exercise is "unreasonable." These principles parallel principles of international law and comity that are recognized and applied by Canada and other nations. In the United States, these principles of international law and comity have found expression in decisions of this Court and the lower federal courts addressing the extraterritorial

regulation of commerce and anticompetitive behavior under U.S. antitrust laws.

Cooperation and accommodation are essential to the orderly and harmonious regulation of international commerce by the family of nations. Both are reflected in the principles of comity and are essential to the functioning of the closely related economies of the United States and Canada. Disregard of these fundamental principles would not only complicate and impede the enforcement of antitrust policies by many other countries, but also would intrude upon and derogate the sovereign prerogatives, rights, and interests of the Government of Canada.

The legal principles that foreclose the unreasonable exercise of extraterritorial jurisdiction have ready application to the facts of this case. From the perspective of the United States, the respondents are foreign nationals. The transactions on which they base their claims occurred solely in foreign commerce and had no effects in the United States or on U.S. commerce. The only real nexus that their claims have with the United States is that the United States is being asked to lend its forum, and its punitive remedies, to the resolution of an otherwise wholly foreign dispute.

ARGUMENT

I. THE DECISION BELOW CONFLICTS WITH PRINCIPLES OF U.S. LAW, INTERNATIONAL LAW, AND INTERNATIONAL COMITY

This case implicates principles of U.S. law, of international law, and of comity with respect to two distinct issues. The first is the proper statutory construction of the Foreign Trade Antitrust Improvements Act ("FTAIA"), 15 U.S.C. § 6a, which has divided the United States Courts of Appeals. The second is whether U.S. courts properly may assert jurisdiction under the circumstances of this case in

light of considerations of comity, even if the broad jurisdictional construction of the statute urged by respondents were upheld.

In addition to statutory construction, principles of international law and comity also come into play when U.S. courts consider whether they should exercise the broadest jurisdiction authorized by a statute or whether, under the facts of a particular case, U.S. courts should decline to exercise jurisdiction. Under U.S. law, this comity of courts, variously treated as a doctrine of judicial restraint or of conflict of laws, would foreclose the exercise of jurisdiction by U.S. courts under the circumstances of this case.

A. The FTAIA Should Be Construed Consistently with Principles of International Law and Comity Embodied in U.S. Jurisprudence

This Court has long held that international considerations are an essential element of statutory construction when determining whether or not a U.S. statute applies beyond the territorial limits of the United States. Two hundred years ago this year, Chief Justice Marshall articulated what has become a fundamental canon of U.S. statutory construction, namely, that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.).

This Court has repeatedly reaffirmed the principles that lay behind Chief Justice Marshall's maxim. As recently as 1991, for example, this Court cited *New York Central Railroad Co. v. Chisholm*, 268 U.S. 29 (1925), as an instance in which a statute properly was construed as lacking extraterritorial application despite the apparent breadth of its jurisdictional grant. *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 251 (1991) ("*Aramco*") (*citing Chisholm*). In *Chisholm*,

this Court explicitly relied on principles of comity to determine that the Federal Employers' Liability Act, 45 U.S.C. §§ 51 *et seq.* – which applied to railways involved in "interstate or foreign commerce" and in commerce between "any of the States or territories and any foreign nation or nations" – lacked extraterritorial effect commensurate with its literal scope. Beginning from the proposition that "the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done," this Court stated that another country's prosecution for those acts not only

> would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent.

268 U.S. at 32 (internal quotation omitted). Accordingly, this Court held that considerations of comity should lead "in cases of doubt to a construction of any statute as intended to be confined in its operation and effect to the territorial limits" over which the lawmaker has "general and legitimate power." *Id.*

These principles of comity have become a firmly established part of the jurisprudence of the United States. In *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) ("*Alcoa*"), for example, Judge Learned Hand cautioned that "we are not to read general words, such as those in [the Sherman Act] without regard to the limitations customarily observed by nations upon the exercise of their powers . . . ." *Id.* at 443. *See also* Restatement (Third) of the Foreign Relations Law of the United States § 403 (1987) ("Restatement"), the commentary to which confirms the "rule of construction" that statutes must be construed whenever possible to avoid unreasonableness or "conflict with the law of another state." *Id.*, cmt. g.

These principles of comity are also firmly established in Canadian jurisprudence:

> "Comity" in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

Morguard Invs., Ltd. v. De Savoye, [1990] S.C.R. 1077, 1096 (Can.) (*citing Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895)).

B. The Broad Interpretation Respondents Propose Would Be "Unreasonable" and Impermissible Under U.S. and International Law

Comity is reflected in the principle of U.S. law that the extraterritorial application of a U.S. law is permissible only to the extent that such an exercise of jurisdiction would not be "unreasonable." Restatement § 403. Indeed, the principle that "an exercise of jurisdiction . . . is nonetheless unlawful if it is unreasonable is established in United States law, and has emerged as a principle of international law as well." *Id.*, cmt. a.

In the United States, whether an exercise of jurisdiction would be reasonable depends, in turn, on a number of factors: (1) the extent to which the activity being regulated is linked to the territory of the regulating state; (2) whether the persons being regulated are linked to the regulating state by nationality, residence, or economic activity; (3) the extent to which other states have an interest in regulating, and do

regulate, the activity at issue; and (4) the likelihood of conflict with the regulation of another state. *Id.* § 403.

These limiting principles of U.S. law parallel and incorporate principles of international law and comity. Under international law, the limitations on the extent to which any single nation can extend its own jurisdiction are generally recognized as flowing from the sovereignty and equality of nations. *See, e.g.*, Ian Brownlie, *Principles of Public International Law*, 287 (6th ed. 2003) ("principal corollaries" of sovereignty and equality include respect of "the area of exclusive jurisdiction of other states").

Territoriality is universally recognized in international law as a primary ground for asserting jurisdiction. *See id.* at 297 ("The starting-point in this part of the law is the proposition that, at least as a presumption, jurisdiction is territorial."). International law has developed a number of additional grounds for asserting jurisdiction that are based on the need for a "substantial and genuine" connection to the nation asserting jurisdiction. *See id.* at 297; John H. Currie, *Public International Law* 308 (2001) ("when viewed as a whole, state practice discloses . . . the requirement of a genuine and effective link justifying extension of a state's prescriptive jurisdiction to any particular person or transaction.").

The courts of Canada, like those of other nations, have also recognized these principles. "Greater comity is required in our modern era when international transactions involve a constant flow of products, wealth and people across the globe." *Hunt v. T & N p.l.c.*, [1993] S.C.R. 289, 322 (Can.). The Supreme Court of Canada also has recognized restrictions on "the exercise of jurisdiction over extraterritorial and transnational transactions," and that a Canadian court may exercise jurisdiction "only if it has a real and substantial connection with the subject matter."

Tolofson v. Jensen, [1994] S.C.R. 1022, 1049 (Can.) (internal quotation omitted). *See also*, *Morguard Invs.* (same); *Amchem Prods., Inc. v. British Columbia Workers' Comp. Board*, [1993] S.C.R. 897 (Can.) (same).

This internationally recognized principle of a "substantial and genuine connection" applied in the United States as "reasonableness" bears on the proper construction of statutes enacted by the United States. *See, e.g., McCulloch v. Sociedad Nacional*, 372 U.S. 10, 21 (1963) (to avoid "international discord," National Labor Relations Act construed not to cover foreign ships employing foreign crews); *Aramco* (Civil Rights Act of 1964 construed to apply to U.S. employers employing U.S. citizens abroad). *See also Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 815 ("this and other courts have frequently recognized that . . . statutes should not be interpreted to regulate foreign persons or conduct if that regulation would conflict with principles of international law.") (Scalia, J., dissenting).

In the context of U.S. antitrust law, the principle that U.S. jurisdiction is necessarily limited was captured memorably by Judge Learned Hand in his admonition that the Congress did not intend to punish "all whom its courts can catch." *Alcoa*, 148 F.2d at 443 (2d Cir. 1945). In this seminal decision construing the extraterritorial reach of the Sherman Act, the court concluded that the Congress intended to punish only extraterritorial acts that were intended to have, and that did have, a substantial effect on the United States. The court expressly recognized that the Sherman Act must be construed in light of the fact that all nations necessarily must, in an interdependent world, limit their unilateral actions:

> [I]t is quite true that we are not to read general words, such as those in [the Sherman Act], without regard to the limitations customarily observed by nations upon the exercise of their powers. . . .

Id. Subsequent amendments to the Sherman Act have altered neither the force of those observations nor the principles on which they were based.

Consideration of the four factors applied by U.S. courts to determine the reasonableness of an exercise of extraterritorial jurisdiction makes clear that the broad application of Sherman Act jurisdiction that respondents propose is not defensible in the circumstances of this case. These factors relate to a nexus with U.S. territory, to a nexus with U.S. nationals, to other countries' interest in regulation, and to conflict with other countries' regulation. *See, e.g., Lauritzen v. Larsen*, 345 U.S. 571, 583-94 (1953) (considering, among other factors, place of harm, nationality of plaintiff, foreign law and adequacy of foreign remedies); *see also Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 383-84 (1959) (same).

(a) No Nexus To the Territory of the United States. The territoriality principle does not support jurisdiction in this case. The transactions on which respondents base their claims under the Sherman Act occurred wholly outside of the territory of the United States. From the perspective of the nations in which the transactions took place, the transactions occurred within their territory and were transactions in their domestic or foreign commerce; by contrast, from the perspective of the United States, the transactions were wholly outside of its territory and wholly within the territory of one or more foreign nations.

Moreover, the transactions giving rise to respondents' claims had no effect on United States commerce. No effects on U.S. commerce or on U.S. foreign commerce – direct, substantial, foreseeable, intended, or otherwise – were alleged to have resulted from the transactions at issue here.

Pet. App. 7a (respondents are "persons injured abroad in transactions otherwise unconnected with the United States"). The only tie alleged to United States is that the sellers' global cartel (in contrast to the specific transactions upon which respondents' causes of action are based) had an effect on United States commerce. Thus, the facts here are fundamentally different from those of *Hartford Fire* and the cases cited therein, in which the transactions were intended to, and did, affect commerce in the United States. 506 U.S. at 776-77.

(b) Insufficient Nexus To Nationals of the United States. None of the respondents is a U.S. national. The respondents are foreign entities domiciled in various countries outside of the United States. The respondents' injuries, the payment of inflated prices for their bulk vitamins purchases, occurred outside the United States. Pet. App. 6a. The various foreign countries in which respondents are domiciled and in which the transactions (and their injuries) occurred have a greater interest in the transactions at issue in this case that the United States. Accordingly, there is no basis for jurisdiction on the basis of nationality. *See, e.g., Romero*, 358 U.S. at 383-84 (noting relative lack of nationality connections to United States); *Lauritzen*, 345 U.S. at 586-88 (same); Restatement § 403(2)(b) & (g) (reasonableness of jurisdiction determined in part by connections to regulating state and to other states).

(c) Canada and Other Nations Have a Strong Interest in Regulating, and Do Regulate, the Type of Activity on Which Respondents' Claims are Based. Canada's strong interest in regulating anticompetitive behavior is evidenced by competition laws that have been in place for more than a century, vigorous enforcement of those laws, the imposition of punitive sanctions against corporations and individual corporate officials for violations of those laws, and civil remedies available to persons injured by cartel or anti-

competitive behavior. Underlying Canada's comprehensive competition laws is a policy commitment to provide all Canadians with competitive market prices and product choices.

In 1889, the Canadian Parliament passed "An Act for the Prevention and Suppression of Combinations Formed in Restraint of Trade," S.C. 1889, ch. 41, the first antitrust law among industrialized nations. Canada's law was in place even before the United States enacted the Sherman Act in 1890. 1 Wilbur L. Fugate, *Foreign Commerce and the Antitrust Laws* 10 (5th ed. 1996).

An important element of effective enforcement of Canada's antitrust laws has been its leniency and amnesty programs. Canada has granted various forms of leniency to cooperating antitrust conspirators since 1991 and the Commissioner of Competition, in consultation with the Attorney General of Canada, adopted a formal amnesty program in 2000. *See* Government of Canada, Competition Bureau Information Bulletin, *Immunity Program Under the Competition Act* (2000).[3] Canada's immunity program, which mirrors the amnesty program instituted by the United States, is used by the Competition Bureau of Canada (the "Bureau") to detect, investigate, and prosecute anticompetitive behavior. Canada's immunity program requires that, when possible, the party seeking immunity will make restitution for the illegal activity.

By offering entities that have violated Canada's Competition Act an opportunity to obtain immunity or leniency in exchange for providing information that can be used to prosecute the other parties engaged in the unlawful anticompetitive conduct, the Canadian immunity program provides a valuable incentive that facilitates enforcement of

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[3] *Available at* http://strategis.ic.gc.ca/pics/ct/immunitye.pdf.

the Competition Act by enabling the Bureau to obtain evidence voluntarily that otherwise might never have come to light. Harry Chandler, *Getting Down to Business: The Strategic Direction of Criminal Competition Law Enforcement in Canada* (Mar. 10, 1994).[4]

The Bureau's program of leniency and immunity has been, in the words of Canada's former Commissioner of Competition, "a singular success" in the Bureau's efforts to uncover and prosecute cartels operating in Canada. Konrad von Finckenstein, *Address to Canadian Bar Association,* Competition Law Section Annual Meeting (Oct. 3, 2002).[5] Amnesty has been particularly successful with respect to international conspiracies when the agreements and evidence of the conspiracy are located outside of Canada and when international cooperation between Canada and foreign nations is necessary. For example, there were 51 prosecutions between 1980 and 2000 under section 45 of the Competition Act with fines totalling approximately Cdn $158 million, mostly in respect of international cartel behavior. Peter Franklyn & Paul Winton, *An Overview of the Immunity Program Under Canada's Competition Act*, Presentation to the American Bar Association Section of International Law and Practice (Fall Meeting, Brussels) at 12-14 (Oct. 17, 2003). Since the immunity program was officially implemented in 1999/2000, the courts have levied more than Cdn $130 million in fines in relation to offences

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4 *Available at* http://strategis.ic.gc.ca/epic/internet/incb-bc.nsf/vwGeneratedInterE/ct01432e.html.

5 *Available at* http://strategis.ic.gc.ca/epic/internet/incb-bc.nsf/vwGeneratedInterE/ct02709e.html.

under the Competition Act. Competition Bureau of Canada, *Penalties Imposed by the Courts* (Dec. 10, 2003).[6]

Canada's enforcement of its competition laws has been consistent with principles adopted by the Organization for Economic Co-operation and Development ("OECD"), and with the practice of a number of countries, including the United States, that have developed and implemented leniency programs as part of their cartel enforcement program. The OECD jurisdictions that have adopted leniency programs include Australia, France, Germany, Hungary, Ireland, South Korea, New Zealand, Norway, Sweden, Switzerland, the United Kingdom, and the European Union. OECD, *Policy Brief: Using Leniency to Fight Hard Core Cartels* at 2 (Sept. 2001).[7]

(d) The Assertion of Jurisdiction that Respondents Urge Would Conflict With Antitrust Regulation by Canada. Exercising jurisdiction in this or similar cases would conflict with Canada's enforcement of its own antitrust regime.

First, upholding U.S. jurisdiction in this case would conflict with and impede effective administration of Canada's immunity program. The administration of that program succeeds because of the incentive it gives cartel members to report their illegal activity and to cooperate with authorities. Under the jurisdictional reach that respondents advocate, a company that has violated the Competition Act in Canada would have less incentive to make a voluntary disclosure to Canadian authorities, because criminal immunity from Canadian authorities would come at the increased cost of punitive treble damages under U.S. law for

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6 *Available at* http://cb-bc.gc.ca/epic/internet/incb-bc.nsf/vwGeneratedInterE/h_ct01709e.html#s-45.

7 *Available at* http://www.oecd.org/dataoecd/60/8/21554908.pdf.

its worldwide transactions. This threat of treble damages may make it too expensive for many cartel members to cooperate, which potentially risks a significant diminution in the effectiveness of the disclosure and immunity program upon which Canadian antitrust enforcement has successfully relied.

United States jurisdiction under the facts of this case would also conflict with Canadian antitrust regulation by undermining Canada's national policy of allowing civil recourse only up to the amount of actual damages, plus costs. *See generally*, the Competition Act, § 36 (civil remedies). The contrary, and unique, policy of the United States permitting the recovery of treble damages in civil antitrust actions likely would prove powerfully attractive to most Canadian plaintiffs injured by anti-competitive behavior in Canada. Treble damages would be available in the United States so long as any part of the cartel affected the United States. Accordingly, the attractiveness of the treble damages remedy would supersede the national policy decision by Canada that civil recovery by Canadian citizens for injuries resulting from anti-competitive behavior in Canada should be limited to actual damages. When an additional U.S. remedy conflicts with such a "comprehensive" policy adopted by another country, jurisdiction is unreasonable. *See Lauritzen,* 345 U.S. at 575.

The conflict with Canadian antitrust regulation and the intrusion on Canadian sovereignty would perhaps be most direct in the case of cartel behavior by Canadian companies in Canada that injured Canadian nationals. A sovereign's interests are most immediately involved in enforcing its own laws against its own nationals for actions within its own territory. Yet if the cartel behavior had some unrelated effect on U.S. commerce, the respondents' proposed construction of the FTAIA would result in U.S. jurisdiction over foreign

nationals and wholly foreign transactions. In comparison to Canada's interests, the interests of the United States would be meager, and the effect of upholding U.S. jurisdiction would be to make the courts of the United States the *de facto* forum of choice for any plaintiff anywhere in the world who could identify some effect of the anticompetitive behavior on U.S. commerce.

Moreover, agreements entered into by competitors who collectively lack market power in Canada are legal because the requisite "undue" economic effect is not present. Nevertheless, if the interpretation of the FTAIA of the court below is adopted, Canadian plaintiffs could commence actions in U.S. courts against Canadian defendants based on lawful transactions in Canada so long as the agreement affects an unrelated party in the United States. Such a sweeping jurisdictional reach would call into question this Court's dictum in *Matsushita* that "American antitrust laws do not regulate the competitive conditions of other nations' economies." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 (1986).

In this case, the cartel through which the respondents vicariously attempt to establish U.S. jurisdiction has already been the subject of enforcement actions by Canadian enforcement authorities. Indeed, Canada has imposed record fines on the participants in the cartel, one of whom is a Canadian resident, for their Canadian transactions and transgressions of Canadian law. Franklyn & Winton, *supra.*

An assertion of U.S. antitrust jurisdiction would undercut Canada's immunity program, would negate the "undueness" element of the offence in Canada, and would effectively supersede Canada's policy on civil recovery. This surely would "conflict with the regulation" of competition by Canada. Accordingly, the assertion of such jurisdiction would be unreasonable under United States law.

Restatement § 403(2)(h) ("the likelihood of conflict with regulation by another state").

C. Under Principles of Comity, U.S. Courts Should Not Exercise Jurisdiction in the Circumstances of this Case.

Even if this Court were to embrace the construction of the FTAIA proffered by respondents, this Court should nevertheless hold that it would be unreasonable for U.S. courts to exercise such jurisdiction. In *Hartford Fire*, this Court raised, but declined to answer, the question whether a court should "decline to exercise [Sherman Act] jurisdiction on grounds of international comity." 509 U.S. at 798 (*citing* H.R. Rep. No. 97-686, at 13 (1982) (FTAIA "would have no effect on the court['s] ability to employ notions of comity . . . or otherwise take account of the international character of the transaction.")); *see also id.* at 797 n.24 ("concerns of comity come into play, if at all, only after a court has determined that the acts complained of are subject to Sherman Act jurisdiction.") (*citing Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1294 (3d Cir. 1979)). In *Mannington Mills*, the Third Circuit held that even when a court does have jurisdiction under the Sherman Act, "foreign policy, reciprocity, comity, and limitations of judicial power are considerations that should have a bearing on the decision to exercise or decline jurisdiction." 595 F.2d at 1296.

In *Romero*, this Court declined to exercise extraterritorial jurisdiction under the Jones Act even though the claim undoubtedly arose under the U.S. statute. 358 U.S. at 383. This Court applied a "conflict-of-law" analysis, noting that it would "move with the circumspection appropriate when this Court is adjudicating issues inevitably entangled in the conduct of our international relations." *Id.*

Moreover, as noted above, the four "reasonableness" factors all would counsel for an invocation of comity to decline jurisdiction in the absence of transactional ties to, or effects on, the United States.

II. MUTUAL, MULTINATIONAL COOPERATION AND ACCOMMODATION ARE ESSENTIAL TO EFFECTIVE ANTITRUST ENFORCEMENT

Canada and the United States share the world's largest trading relationship with approximately US$1.2 billion in goods crossing the border each day. *See* Canada Department of Foreign Affairs and International Trade, Trade and Economic Analysis Division, *Fourth Annual Report on Canada's State of Trade* (May 2003).[8] The United States is the destination of more that 81% of Canadian exports and the source of 70% of its imports. *Id.* The market for U.S. goods in Canada is larger than the market for such goods in the fifteen nations of the European Union combined and more than three times as large as the Japanese market for U.S. goods. U.S. Dep't of Commerce, Bureau of Economic Analysis, *U.S. Int'l Trade in Goods and Services*, Ex. 14 (Jan. 14, 2004).[9] Through November 2003, Canada took in almost 24% of all U.S. exports for the year. *Id.*

With this singular commercial relationship comes a commensurate need for mutual cooperation and reliance in antitrust enforcement. The efficacy of such cooperation could be threatened by the unilateral exercise of jurisdiction by the United States under the facts of this case.

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[8] *Available at* http://www.dfait-maeci.gc.ca/eet/trade/sot_2003/SOT_2003-en.asp.

[9] *Available at* http://www.bea.gov/bea/newsrel/trad1103.xls.

Canada and the United States share a long history of cooperation in investigating and prosecuting international cartels dating back to the early 1900's when they jointly investigated and prosecuted a cartel involving newsprint that operated in both countries. *See* George N. Addy, *International Harmonization Efforts and Enforcement Cooperation: The Canadian Experience* (Mar. 1994).[10] More recently, an Assistant Attorney General of the Antitrust Division characterized the United States' "cooperative relationship with Canada" in civil and criminal antitrust enforcement as "central to the success we and our sister agencies have enjoyed" in a number of investigations, which demonstrates the "benefits of cooperation to both cooperating countries." Anne K. Bingaman, *International Cooperation and the Future of U.S. Antitrust Enforcement* (May 16, 1996).[11]

The commitment of the United States and Canada to mutual cooperation in antitrust enforcement also is advanced by multilateral agreements such as the North American Free Trade Agreement, as well as in a singular series of bilateral agreements. The 1959 Joint Statement Concerning Cooperation in Antitrust Matters (the Fulton-Rogers Agreement), for example, created a formal consultative procedure for competitive matters of mutual concern. This commitment to joint cooperation was reinforced by a Memorandum of Understanding in 1969, and was further advanced in the Memorandum of Understanding as to Notification, Consultation and Cooperation with respect to the Application of National Antitrust Law, which was

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[10] *Available at* http://strategis.ic.gc.ca/epic/internet/incb-bc.nsf/vwGeneratedInterE/ct01394e.html.

[11] *Available at* http://www.usdoj.gov/atr/public/speeches/96-05-16.htm.

adopted in 1984. Under this agreement, the antitrust authorities in both countries are required to notify the other whenever antitrust investigations, proceedings, or actions affect or could affect the national interests of the other or would necessitate a search for information in the other.

The 1990 Mutual Legal Assistance Treaty between the United States and Canada allows enforcement authorities in either country to invoke assistance for compulsory process in the other country for criminal matters, including criminal antitrust matters. In 1995, both countries signed the U.S./Canada Agreement Regarding the Application of Their Competition and Deceptive Marketing Practices Laws (the "U.S./Canada Marketing Agreement"), which provides for notification to the other when antitrust enforcement activities "may affect important interests of the other" or may involve obtaining information from the other country.

The U.S./Canada Marketing Agreement endorses the concept of "positive comity," under which one country agrees to consider the other country's request to initiate or expand an antitrust investigation. Accordingly, the Antitrust Guidelines for International Operations adopted by the Antitrust Division of the U.S. Department of Justice require the agency to consider whether "any significant interests of foreign nations would in fact be affected by such exercise of jurisdiction," and to consider deferring exercise of that jurisdiction when there would be such an effect. 53 Fed. Reg. 21584, 21595 (June 8, 1988).

In recent years the OECD has encouraged many nations to adopt comprehensive antitrust enforcement programs and to expand their cooperative efforts. *See generally,* OECD, *Hard Core Cartels* (2000).[12] These efforts largely have been successful:

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[12] *Available at* http://www.oecd.org/dataoecd/39/63/2752129.pdf.

> Japan recently entered into its first co-operation agreement, with the US, and the latter has also entered into recent co-operation agreements with Brazil and Israel. . . . Given the benefits that international co-operation has had when it has been used, it seems likely that unwarranted obstacles to such co-operation will increasingly be viewed as harmful both to the countries that impose them and to the global economy.

Id. at 28.

Further, the OECD specifically urges its members states to apply principles of comity with respect to cartels:

> Member countries have a common interest in preventing hard core cartels and should co-operate with each other in enforcing their laws against such cartels. In this connection, they should seek ways in which co-operation might be improved by positive comity principles . . . and should conduct their own enforcement activities in accordance with principles of comity when they affect other countries' important interests.

OECD, *Recommendation of the Council Concerning Effective Action Against Hard Core Cartels* (May 14, 1998).[13]

But the interpretation of the FTAIA by the court below appears likely to remove the incentives of other foreign jurisdictions to implement comprehensive antitrust enforcement regimes and to expand their cooperative efforts for the same reasons that the decision adversely affects Canada's interests. Thus, the unilateral assertion of

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[13] *Available at* http://strategis.ic.gc.ca/pics/ct/1998oecd_hccrec.pdf.

jurisdiction by the United States would, ultimately, impair the interests of the United States in effective mutual cooperation and enforcement.

Extending jurisdiction in this case without consideration of the reasonableness of exercising the courts' powers under the principles of international law articulated above would elevate the courts of the United States to an unwarranted and unintended position of preeminence in international antitrust regulation and enforcement, and to a position of appearing indifferent to the impact of the exercise of their powers on other countries. The United States should not, and the Government of Canada would not, welcome such a result.

CONCLUSION

Construing the FTAIA to cover a dispute between foreign parties over transactions wholly in foreign countries would be unreasonable. Such a construction would be inconsistent with U.S. law and principles of international law and comity. In addition, a decision by U.S. courts to exercise jurisdiction under such circumstances would be inconsistent with established principles of international comity.

The unreasonableness of the result that respondents espouse also stems from the practical consequences that such broad extraterritorial action would have on antitrust policies and enforcement efforts of other countries. It would frustrate international interests in effective mutual cooperation in antitrust deterrence and enforcement that increasingly is essential in an economically interconnected family of nations.

Accordingly, the Government of Canada respectfully submits that the judgment of the United States Court of Appeals for the District of Columbia Circuit should be reversed.

Respectfully submitted,

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